

## Equality and Non-Discrimination: Basic Principles

Equality is a founding principle of a democratic society since a true democracy can only work if individuals have equal access to participation in the economic, social, cultural and political fields. In fact, the principle that persons should receive protection from discrimination is enshrined in those documents that are at the foundation of national and international legislation, such as Article 45 of the Maltese Constitution, Article 10 of Treaty on the Functioning of the European Union and Article 7 of the Universal Declaration of Human Rights. However, in everyday life, persons face discrimination in a range of circumstances like employment or when accessing a service. Often, victims of discrimination are hesitant to take action or are even unaware that action can be taken.

Is it possible to translate the principle of equal treatment into protection from discrimination in practice? Laws that prohibit discrimination, known as equality legislation, seek precisely this. EU Directives place an obligation on Member States to implement laws that clearly outline the prohibition of different forms of discrimination, and to establish equality bodies to ensure the implementation of the basic right to equal treatment so that people receive effective protection from discrimination in everyday life. The effectiveness of any equality body depends on the strength of the legal framework that establishes it. Thus in order to have an effective equality legislation, Member States are to develop a framework that is inclusive of, but not limited to, those safeguards against discrimination outlined in EU Directives that provide only for the minimum provisions.

In Malta, legislation that specifically prohibits discrimination on a number of grounds has existed since 2003. Chapter 456 and its subsidiary legislation establishes the National Commission for the Promotion of Equality (NCPE) as an equality body tasked with promoting equality in society as well as responsible for receiving and investigating complaints of discrimination. It delineates both the grounds of discrimination (e.g. sex, age, race/ethnic origin, sexual orientation etc.), as well as the areas in which the prohibition of discrimination applies (e.g. employment, education etc.). Chapter 456 also defines the concept of discrimination in its different forms - discrimination can be direct or indirect, and it can take the form of harassment or sexual harassment.

One of the key roles of the NCPE is to investigate cases of discrimination since the equality body offers the most accessible way for people to report such cases. The Commissioner, tasked with carrying out the investigation and concluding cases of alleged discrimination, has to be a person well versed in the subject of equality so that s/he can identify cases of discrimination and fully understand their implication. Lawyers assist the Commissioner throughout the investigation process.

A provision common to equality law in different EU Member States concerns the shift in the burden of proof. One of the main factors hindering people from reporting unequal treatment is the perception that discrimination is too difficult to prove. For example, a person alleging that s/he is facing pay discrimination in employment would find it very hard to prove the claim as it is the employer that retains the information needed to substantiate it. In order to address this problem Article 9(1) of EU Directive 2006/54/EC states that: ***“it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”*** as long as ***“facts from which it may be presumed that there has been direct or indirect discrimination”*** have been brought ***“before a court or other competent authority”***.

The European Courts of Justice recognise that the adoption of rules on the burden of proof play a significant role in ensuring that the principle of equal treatment can be effectively enforced. Thus, EU Directives clearly oblige Member States to make provisions ensuring that the burden of proof shifts

to the respondent (i.e. the person accused of discrimination) when there is a prima facie case of discrimination.

In Malta, the main principles of equality law have been enshrined in Chapter 456 since its enactment in 2003. These include the delineation of the grounds of discrimination, the remit of the Commission and a Commissioner responsible for investigating cases, definition of the different forms of discrimination and provisions for the shifting of the burden of proof. The new equality law, that is currently being discussed at a national level, will not alter these basic principles. However, the new law can address the shortcomings of current equality legislation and increase effectiveness in protecting all persons from discrimination.